No. 85-1946

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

JEFFERSON N. MARSH
PRIVATE FIRST CLASS, UNITED STATES ARMY,
PETITIONER

v.

THE UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTIONS PRESENTED

1. WHETHER negligent destruction of Jencks Act material is sufficient to invoke the Act's sanctions against the government?

2. WHETHER a good faith exception to the Jencks Act should apply when the government, contrary to its own policy, negligently loses or destroys witnesses' prior recorded testimony and provides instead a summarized transcript?

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S. Rep. No. 981, 85th Cong. 1st Sess., 3 (1957), U.S. Code Cong. and Admin. News 1957 5

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No. _____

JEFFERSON N. MARSH
PRIVATE FIRST CLASS, UNITED STATES ARMY,
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v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Jefferson N. Marsh, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 21 M.J. 445 (C.M.A. 1986) (Appendix A). The opinion of the Army Court of Military Review is unpublished, CM 441079 (A.C.M.R. 4 Feb. 1983) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on March 31, 1986, affirming petitioner's conviction dated January 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259.

STATUTORY PROVISIONS INVOLVED

The Jencks Act, 18 U.S.C. § 3500 provides:

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion

> of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.
>
> . . . .
>
> (d) If the United States elects not to comply with an order of the court . . . to deliver to the defendant any such statements, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

The Uniform Code of Military Justice, 10 U.S.C. § 832 (1982), provides:

> Article 32
>
> (a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made.
>
> . . . .
>
> (b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. . . . At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. . . .

STATEMENT OF THE CASE

Private First Class (PFC) Sharon A. Booker claimed to have been stabbed in the neck by the petitioner on September 15, 1980. An Article 32[1] pretrial investigation hearing into

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[1] Article 32, Uniform Code of Military Justice, 10 U.S.C. § 832 (1982) [hereinafter cited as Article 32].

this allegation was conducted on 7 November 1980 and a tape recording was made of the proceedings (R. 18). At the Article 32 hearing defense counsel requested that the tape recordings be preserved and was assured that they would be retained by Specialist Five (SP5) Renfrow, who made the recordings and the summarized transcript of the Article 32 proceedings from the recordings (R. 18, 19, 25). Upon being transferred to a new office but prior to his departure, SP5 Renfrow placed the tapes, labeled "Marsh", in the desk drawer of the noncommissioned officer in charge, Specialist Six Strange (R. 24, 27, 136-38). Both knew that defense counsel had requested that the tapes be preserved for the petitioner's trial but Specialist Six Strange could not remember if any special marking on or binding of the tapes was made to insure their preservation (R. 138-140). He did check to insure that the tapes were present on the day they were requested on a defense motion (approximately one week prior to trial) but took no additional precautions to insure their continued availability (R. 140). The tapes could not be located at the time of trial.[2]

A transcript had been made of the tapes by SP5 Renfrow who testified, in response to a question as to whether he had prepared a verbatim record:

> Well, I should explain, I was kind of hassled every once in a while at the JAG office for taking so long to do the 32 because I – I didn't actually summarize it, I did most of it, right how it was said and I was told, "hey you don't have to do that, just summarize it", but most of my, let's say, all of my 32s are almost word for word.

(R. 24). He conceded that this was a summarized transcript (*Id.*). Defense counsel, who was present at the Article 32 investigation, and Military Police Investigator (MPI) Cochran

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[2] There is no issue before the Court as to whether the tape recordings were materials whose production was required by the Jencks Act, 18 U.S.C. § 3500 [hereinafter cited as the Jencks Act or the Act]. The Court of Military Appeals held, particularly under the facts of this case, that the tape recordings were statements for purposes of application of a Jencks Act analysis. United States v. Marsh, 21 M.J. 445, 451 (C.M.A. 1986).

and PFC Booker, who both testified at the investigation, all indicated that there were omissions or discrepancies in the summarized transcript (R. 20-21, 81-82, 225, 237-38). The prosecution requested that the jury be instructed that the transcript of the Article 32 hearing was summarized and that it may not have contained some of the victim's testimony (R. 247-48). Defense moved first in a preliminary hearing to exclude, then subsequently to strike, the testimony of both PFC Booker and MPI Cochran. Both motions were denied (R. 18, 39, 212, 244). Contrary to his pleas, petitioner was convicted of aggravated assault and sentenced to confinement at hard labor for one year, forfeiture of all pay and allowances, and reduction to the grade of Private E-1. The lower appellate courts have considered the issues presented in this petition. As a prerequisite to the Court's jurisdiction, the Court of Military Appeals granted the following issue:

> WHETHER THE MILITARY JUDGE ERRONEOUSLY DENIED A DEFENSE MOTION TO STRIKE THE DIRECT TESTIMONY OF TWO GOVERNMENT WITNESSESS FOLLOWING THE GOVERNMENT'S FAILURE TO PROVIDE A VERBATIM COPY OR TAPE OF THEIR PRIOR SWORN TESTIMONY AS REQUIRED UNDER THE JENCKS ACT.

REASONS FOR GRANTING THE WRIT

When Congress enacted the Jencks Act, it provided for sanctions when the government refused to provide the defense with prior relevant statements of testifying government witnesses. Appellate courts are split on the issue of whether a good faith destruction of such statements is sufficient to invoke sanctions. The Court's opinion of this important federal question is necessary to resolve this conflict between circuits.

I. THE SANCTIONS OF THE JENCKS ACT SHOULD APPLY, REGARDLESS OF GOOD FAITH, WHEN JENCKS ACT MATERIALS ARE DESTROYED OR LOST.

In *Jencks v. United States*, 353 U.S. 657 (1957), the Court held that criminal defendants in federal courts were entitled to inspect

government records of prior statements of prosecution witnesses. Lower courts' expansive interpretation of this right to production led to defense "fishing expeditions" which, in turn, caused Congress to enact the Jencks Act in an effort to correct this perceived abuse of the trial process. *Goldberg v. United States*, 425 U.S. 94, 102-105 (1976). The Act reaffirmed that " 'a defendant on trial in a criminal prosecution is entitled to relevant and competent reports and statements in possession of the government touching the events and activities as to which a government witness has testified at the trial.' " *Id.* at 104, *quoting* S. Rep. No. 981, 85th Cong. 1st Sess., 3 (1957), U.S. Code Cong. and Admin. News 1957, p. 1862. The Act established clear guidelines, *e.g.* production is required only after the witness has testified on direct examination and is limited to matters relevant to that testimony. There are clear sanctions for nonproduction, *i.e.*, the striking of the trial testimony or mistrial. When the government refuses to comply, the violation and the mandated sanctions are clear. However, the question here, not resolved by the Court in *Campbell v. United States*, 365 U.S. 85, 98 (1961), is whether destruction through government negligence, without improper motive, constitutes the equivalent of noncompliance.

The extent of the government's duty to preserve producible materials remains unresolved, although the Court has implied that, under some circumstances, a duty to preserve may exist. *Killian v. United States*, 368 U.S. 231, 242 (1961). Lower courts are divided on the issue. Some courts have held that, irrespective of good faith, deliberate destruction of materials covered by the Act may violate the Act,[3] while others hold that a good faith destruction does not invoke the

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[3] *E.g.*, United States v. Bufalino, 576 F.2d 446, 449 (2d Cir. 1978), *cert. denied*, 439 U.S. 928 (1978) ("where . . . destruction is deliberate, sanctions will normally follow, irrespective of the perpetrator's motivation, unless the Government can bear the heavy burden of demonstrating that no prejudice resulted to the defendant."); United States v. Harris, 543 F.2d 1247, 1248 (9th Cir. 1976) ("[w]e reject the contention of the government that the good-faith destruction of rough notes in accordance with normal agency procedure is justifiable."); United States v. Carrasco, 537 F.2d 372, 375-77 (9th Cir. 1976) (good faith destruction pursuant to routine procedure is nevertheless a Jencks Act violation); Lee v. United States, 368 F.2d 834,

Act's sanctions.[4] The Court of Military Appeals below conceded that the loss of the tapes in this case may have been negligent but ruled that it was not "gross negligence amounting to an election by the prosecution to suppress these materials." *United States v. Marsh*, 21 M.J. at 452. The petitioner submits that either deliberate or negligent destruction of materials covered by the Act should invoke the Act's sanctions, regardless of the absence of bad faith on the part of the government. *See United States v. Perry*, 471 F.2d 1057, 1067 (D.C. Cir. 1972) (duty to preserve violated when materials destroyed as a result "of either negligence or purposeful destruction accompanied by either bad motive or bad judgment"). A rule which applies sanctions for deliberate good faith destruction should also apply to negligent good faith destruction. Any different rule would merely serve to give the government *carte blanche* to be systematically "negligent" in the preservation of materials covered by the Act.

While the Court has recognized that the Jencks Act was not "cast in constitutional terms," *United States v. Augenblick*, 393 U.S. 348, 356 (1969), *citing Palermo v. United States*, 360 U.S. 343, 345, 362 (1959), nevertheless the duty of preservation has its underpinnings based on the right under the sixth amendment to effective assistance of counsel and the right to confront one's accusers in a meaningful way. "[I]t would be idle to say that the commands of the Constitution were not close to the surface of the [*Jencks*] decision." *Palermo v. United States*, 360 U.S. at 362-63 (Brennan, J.,

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837 (D.C. Cir. 1966) (Jencks Act "does not embody in terms any good faith exception"); United States v. Lonardo, 350 F.2d 523, 527-30 (6th Cir. 1965) (deliberate destruction of statements, even in good faith reliance on FBI regulations, invoked the Act's sanctions).

[4] *E.g.*, United States v. Bastanipour, 697 F.2d 170, 174-75 (7th Cir. 1982), *cert. denied*, 460 U.S. 1091 (1983) (no violation when draft was destroyed in unwitting violation of policy and final draft contained all the information in the original destroyed draft); United States v. Shovea, 580 F.2d 1382, 1389-90 (10th Cir. 1978), *cert. denied*, 440 U.S. 908 (1979) (sanctions not applied when destruction of investigatory notes was done after they were incorporated into final report pursuant to established policies); United States v. Martin, 565 F.2d 362 (5th Cir. 1978) (no violation of Act where destruction of FBI interview notes was in good faith following normal practice).

concurring). The motivation of the government in failing to produce materials required under the Act is irrelevant. Irrespective of government good faith, the accused is deprived of the evidence and a fair trial.

II. A GOOD FAITH EXCEPTION SHOULD NOT APPLY TO EXCUSE THE GOVERNMENT'S OWN NEGLIGENCE IN FAILING TO SAFEGUARD JENCKS ACT MATERIALS WHEN THERE IS NO EQUIVALENT SUBSTITUTE.

Whether sanctions for violations of the Act are to be applied depends on the balance struck between the government's culpability and the prejudice to the accused. *United States v. Miranda*, 526 F.2d 1319, 1324-25 (2d Cir. 1975), *cert. denied*, 429 U.S. 821 (1976), *citing United States v. Pfingst*, 490 F.2d 262, 277 (2d Cir. 1973), *cert. denied*, 417 U.S. 919 (1974). The Court of Military Appeals below ruled that the Act's sanctions should not be applied because the government was not grossly negligent and additionally because the petitioner was provided with a summarized transcript that was "almost word for word" and upon which effective cross-examination was conducted. *United States v. Marsh*, 21 M.J. at 452. The petitioner submits that the lower court erred in its application of these balancing factors.

The government had sufficient notice of the need to preserve the tapes, maintained sole control of them, and could not explain their loss in the face of a policy, unlike the policies discussed in *United States v. Shovea*, 580 F.2d at 1389-90 and *United States v. Martin*, 565 F.2d at 363, that mandated their retention. Thus, the government negligently failed to comply with its own policy. After being preserved for almost two months the tapes disappeared fortuitously within one week of trial. *See United States v. Lonardo*, 350 F.2d at 525-529 (tapes destroyed "on the eve of trial," *i.e.*, a week and a half prior to trial). Furthermore, the transcripts did not preserve all of the testimony on the tapes. *See infra*. *Cf. United States v. Covello*, 410 F.2d 536, 545 (2d Cir. 1969), *cert. denied*, 396 U.S. 879 (1969) ("Absent an indication that

the notes were destroyed for an improper purpose or that the handwritten data was not preserved in the formal reports the reports satisfy the requirements of § 3500."); *United States v. Bastanipour*, 697 F.2d at 174 (no violation of Jencks Act when final draft of report contained all of the information in the original first draft). Under these circumstances the government's culpability weighs heavily in the balance.

Further, the Court of Military Appeals erroneously decided the issue of prejudice to the petitioner. The lower court found that the court reporter testified without contradiction that the summarized transcript provided was "almost word for word." *United States v. Marsh*, 21 M.J. at 451-52. In this finding the court erred. First, neither the trial judge nor the Army Court of Military Review found that the summarized transcript was almost a verbatim one.[5] In finding the transcript to be virtually verbatim, the Court of Military Appeals not only took unto itself a fact-finding authority to which it is not authorized,[6] its finding was clearly erroneous. While the court reporter, in confused testimony, did state that all his transcripts of Article 32 proceedings were almost word for word, that testimony was contradicted by defense counsel, by the witnesses, even by the prosecutor who requested a jury instruction that the transcript was summarized and may have omitted some of the victim's testimony. Thus the petitioner was not afforded, in the form of the summarized transcript, a substitute equivalent to the missing tapes.

III. PETITIONER WAS PREJUDICED BY THE DECISION OF THE COURT BELOW.

The petitioner was denied the opportunity to cross-examine prosecution witnesses based on inconsistencies between their trial testimony and their sworn testimony at the Article 32 in-

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[5] The trial judge made no findings as to the content of the transcript. The Army Court of Military Review found only that the summary was accurate and substantially complete. United States v. Marsh, CM 441079 (A.C.M.R. 4 Feb. 1983) (unpub.), slip op. at 3.

[6] *Compare* Article 67(d), Uniform Code of Military Justice (Court of Military Appeals "shall take action only with respect to matters of law") *with* Article 66(c), Uniform Code of Military Justice (Court of Military Review "may . . . determine controverted questions of fact . . .").

vestigation. Defense counsel specifically relied on the fact that the tapes would be preserved and did not take complete notes during the investigation. Instead of the promised tapes, defense counsel was provided a summarized transcript which seriously impeded his ability to cross-examine and impeach government witnesses. This was especially critical in cross-examination of the victim, the sole witness to the alleged assault. The criticality with which counsel viewed the verbatim material with regard to cross-examination and impeachment is evidenced by the fervor with which he repeatedly raised the issue. As the Court noted in discussing the *Jencks* decision, "[o]nce the statements had been shown to contain related material only the defense was adequately equipped to decide whether they had value for impeachment." *Palermo v. United States*, 360 U.S. at 346. "An appellate court should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled." *Rosenberg v. United States*, 360 U.S. 367, 371 (1959). The government's negligent loss of the tapes vitiated potentially significant cross-examination and impeachment of the main prosecution witness. The harmless error doctrine should be strictly applied to the non-production of Jencks Act materials. *Goldberg v. United States*, 425 U.S. at 111 n. 21. Under such an application the government's negligent loss of the requested tapes was clearly prejudicial.

CONCLUSION

This case presents a fundamental issue on the application of federal statutory sanctions on which the federal circuit courts have split. For this reason the petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 46,912
CM 441079

UNITED STATES, APPELLEE,

v.

JEFFERSON N. MARSH, PRIVATE FIRST CLASS, U.S. ARMY, APPELLANT.

March 31, 1986

For Appellant: *Captain Rita R. Carroll* (argued); *Colonel R. Rex Brookshire, II* and *Major Paul J. Luedtke* (on brief); *Colonel Wiiliam G. Eckhardt.*

For Appellee: *Captain Dean C. Berry* (argued); *Colonel James Kucera, Lieutenant Colonel John T. Edwards, Major Joseph A. Rehyansky* and *Captain James C. Underhill, Jr.* (on brief).

OPINION OF THE COURT

EVERETT, Chief Judge:

Appellant was tried by a general court martial with officer members sitting at Nellingen Barracks, Federal Republic of Germany. Contrary to his pleas, he was found guilty of aggravated assault, in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928. He was sentenced to confinement for 1 year, total forfeitures for that period, and reduction to the lowest enlisted grade. The convening authority approved this sentence, and the Court of Military Review affirmed in an unpublished opinion.

This Court granted review of these two issues:

I

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF THE AP-

PELLANT BY FAILING TO DISMISS THE CHARGE AND SPECIFICATION FOR LACK OF JURISDICTION.

II

WHETHER THE MILITARY JUDGE ERRONEOUSLY DENIED A DEFENSE MOTION TO STRIKE THE DIRECT TESTIMONY OF TWO GOVERNMENT WITNESSES FOLLOWING THE GOVERNMENT'S FAILURE TO PRODUCE A VERBATIM COPY OR TAPE OF THEIR PRIOR SWORN TESTIMONY AS REQUIRED UNDER THE JENCKS ACT.

We have considered these questions and conclude the relief is not warranted.

The Court of Military Review briefly summarized the facts pertinent to each of the above issues:

> The appellant asserts that the members detailed to his court-martial were improperly selected and therefore that his court-martial lacked personal jurisdiction over him. The charges were initially referred to trial by the general court-martial convened by Court-Martial Convening Order Number 367, dated 8 December 1980. According to a stipulation of fact, the trial counsel learned that because several of the members detailed by that order had been excused by the convening authority, additional members needed to be detailed. She was then instructed by the chief of the criminal law division in the office of the staff judge advocate to determine which members from another panel previously selected by the convening authority would be available. She was told to do this by starting with First Lieutenant Mitchell, a female officer, and then by order of seniority down the list to "find the first five members who were available on the scheduled trial date." After the trial counsel did so, the staff judge advocate recommended to the convening authority that the five members be detailed to the appellant's trial. He also advised the convening authority that he was not limited to those named but "could select

members from throughout the command." The convening authority agreed and detailed the five persons recommended. This action was appropriately reflected in an amending order.

* * * * * *

The appellant next asserts that the military judge erred by refusing to strike the testimony of the victim and a military police investigator pursuant to the Jencks Act, 18 U.S.C. § 3500. Both of these witnesses testified at the Article 32 [UCMJ, 10 U.S.C. § 832] investigation. The legal clerk who recorded those proceedings was asked by the appellant's counsel to preserve the tape recordings. The clerk replied that he would. Upon changing jobs, the clerk gave the tapes to Specialist Stange, the noncommissioned officer in charge of the branch legal office involved. That individual testified that he placed the tapes in his desk, but did not take any special steps to protect them, and could not recall if they were specially marked. Shortly before trial, the defense counsel asked to review the tapes. At that time, it was discovered that they had disappeared. As the government could not produce the tapes, the defense, upon completion of the direct examination of both witnesses, moved that the testimony of the witnesses be stricken pursuant to 18 U.S.C. § 3500(d). The military judge denied the motion.

Unpublished opinion at 1-2, 2-3.

I

Appellant's basic contention is that purported defects in the process of detailing replacement members for his court-martial deprived this military tribunal of its jurisdiction to try him for these offenses. *See United States v. Ryan*, 5 M.J. 97, 101 (C.M.A.1978); *see also* Art. 29(b), UCMJ, 10 U.S.C. § 829(b). His criticisms of the procedures used in composing this court-martial are numerous; and we shall address each separately, although we shall also consider their collective effect, if any, on the appearance of fairness in the military justice system. *See generally United States v. Greene*, 20

U.S.C.M.A. 232, 237-38, 43 C.M.R. 72, 77-78 (1970); *United States v. Hedges*, 11 U.S.C.M.A. 642, 645, 29 C.M.R. 458, 461 (1960) (Latimer, J., concurring).

A

The first attack on the composition of appellant's court-martial is based on the prosecution's role in securing replacement members. *See generally United States v. Crumb*, 10 M.J. 520, 527-28 (A.C.M.R.1980) (Jones, S.J., concurring); *United States v. Cook*, 18 C.M.R. 715 (A.B.R.1955). The record indicates that trial counsel was informed shortly before trial that certain members of the court-martial panel – Panel R – to which Marsh's case had been referred were excused or unavailable. She brought this matter to the attention of the "chief of the criminal law division," who worked for the staff judge advocate of the convening authority. He instructed her to contact several members of a second panel – Panel P – to see if they were available to sit as members in appellant's case. She accomplished this task and reported the results to the assistant staff judge advocate. The records indicate no further involvement on her part in the replacement process.

We believe it is well-established in military law that the trial counsel, being a partisan advocate, can play no part in the selection of court members. *United States v. Cherry*, 14 M.J. 251 (C.M.A. 1982); *United States v. Aho*, 8 M.J. 236 (C.M.A. 1980). However, we recognize that this officer has certain ministerial responsibilities, such as notifying members of the scheduled trial date and reporting matters concerning their availabiilty to the conveying authority.[1] Paras. *41c* and *44f*(2), Manual for Courts-Martial, United States, 1969 (Revised edition); *see also* DA Pamphlet 27-5,

[1] Neither at the time of this trial, *see* Art. 25(d)(2), Uniform Code of Military Justice, 10 U.S.C. § 825(d)(2), nor subsequently *see* Art. 25(e), has a trial counsel possessed authority to excuse a prospective or detailed court member on the ground of availability. No evidence was presented that trial counsel in this case exercised such authority with respect to the members of Panel R or Panel P.

Staff Judge Advocate Handbook 112 (1963).[2] In this light, we conclude that trial counsel here played no meaningful role in the selection of the replacement members.

Appellate defense counsel then asserts that the chief of the criminal law division should not have participated in the replacement process because he also had prosecutorial responsibilities and, in some respects, might be deemed the chief prosecutor in the office of the staff judge advocate.

Although this officer did not purport to act as trial counsel or assistant trial counsel, *cf. United States v. Beard*, 15 M.J. 768, 773 (A.F.C.M.R.1983), we recognize that substance, rather than form, should be determinative. However, in this regard, appellant is at a disadvantage. He made no contention at trial that the chief of the criminal law division had tainted the process of selecting or replacing court members, so the record is devoid of evidence as to the specific responsibilities of this officer. Moreover, appellate defense counsel has provided us no information in this regard.

The Government referred to this officer as the "chief of military justice," a position in the staff judge advocate's office which is adverted to in the Army's *Staff Judge Advocate Handbook, supra*. Our perusal of this document does not indicate that the chief of military justice is intended to be a chief prosecutor or to perform prosecutorial duties. *Id.* at 23-24, 26-27. Moreover, we note that although in *Greene* this Court invalidated a selection of court members in which a major role was played by the chief of military justice in the office of an Air Force staff judge advocate, there was no intimation that this officer was disqualified *per se* by the duties of his position to participate in recommending court members.

If the defense argument were accepted here, it would be hard to escape applying the same rationale to the staff judge advocate, to whose office and supervision the trial counsel is assigned in the Army.[3] Indeed, from time to time there has

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[2] While the *Handbook* was rescinded in 1979 and not replaced prior to this trial, we believe that the description of the functions of the officers referred to in this opinion is still applicable here.

[3] In the Navy, on the other hand, the prosecutor is obtained from a Legal Service Office and is not supervised by the staff judge advocate who advises the convening authority.

been comment about the possible prosecutorial orientation of the staff judge advocate and the convening authority. *See, e.g., United States v. Brown*, 13 M.J. 253, 260 (C.M.A.1982) (Fletcher, J., concurring in the result); *United States v. Hardin*, 7 M.J. 399 (C.M.A.1979); Douglass, *Changing Roles from Judge to Prosecutor*, 5th Annual Homer Ferguson Conference on Appellate Advocacy (1980). Nonetheless, the Code has entrusted selection of court members to the convening authority, and military precedent has allowed the staff judge advocate to make recommendations for selection. In the absence of a particular showing of partisan advocacy, we cannot see why the staff judge advocate or a member of his staff, whatever his title, should be *per se* excluded from making these recommendations.

B

The second major challenge to the composition of appellant's court-martial was that, although Lieutenant General Becton, the convenying authority, had personally selected the replacement members, he had not been "wholly unfettered" in his choice. *See United States v. Greene, supra* at 237, 43 C.M.R. at 77. Appellant notes that General Becton was not confronted with the decision on replacement until the day of trial; and at that time he was informed that those members recommended by the staff judge advocate as replacements had already been contacted and were available. However, unlike the situation presented in *United States v. Greene, supra*, these officers has previously been selected by the convening authority to serve as members on Panel P – another general court-martial panel in the command. This fact suggests that General Becton had sufficient time to assess their qualifications in terms of the criteria specified in Article 25(d)(2), UCMJ, 10 U.S.C. § 825(d)(2). Moreover, the staff judge advocate also provided him with the names of officers comprising Panel Q – a third panel which had been previously selected as qualified for general court-martial duty. Finally, the staff judge advocate expressly advised the convening authority that he was not limited to any of those

persons listed and he could detail any officer or warrant officer in his command.

We recognize that the work of subordinates can be done in such a way that a superior has no practical alternative but to follow their recommendation. This goes far beyond efficient staff work by subordinates to anticipate the wishes of the superior. If it appeared to us that the actions of the chief of the criminal law division had presented General Becton with a *fait accompli* so that he had no real choice but to appoint as replacements the persons who had been recommended by his subordinates, we would not hesitate to say that he was not "wholly unfettered" in his selection and that Article 25 of the Code had been violated. *United States v. Greene, supra.* However, the record simply does not support such a conclusion.

C

Appellant's third challenge to the composition of his court-martial was based on the criteria considered in selecting the replacement members. *See United States v. Daigle*, 1 M.J. 139 (C.M.A.1975). The staff judge advocate had recommended that, in replacing the members excused from Panel R, General Becton should appoint a female lieutenant from Panel P and thereafter should make replacements by beginning with the senior member of that panel who was available and working down the list according to rank. Consequently, Marsh asserts that, with the single exception of the female, seniority was the sole criterion upon which the convening authority based his selection of replacements. From this premise, he reasons that officers of lower rank were systematically excluded in violation of Article 25(d)(2). *See United States v. Yager*, 7 M.J. 171, 172 (C.M.A.1979). We disagree.

It is well-established that a convening authority may rely on his staff to nominate court members to be considered by him for ultimate appointment to a particular court. *United States v. Kemp*, 22 U.S.C.M.A. 152, 46 C.M.R. 152 (1973). Otherwise, in a large and busy command his task would be overwhelming. In appellant's case, the chief of the criminal

law division and the staff judge advocate performed this "preliminary screening" function. The record provides no direct evidence of the instructions they received from the convening authority in this regard. *Cf. id.*, 46 C.M.R. at 155. However, it does show that, prior to Marsh's court-martial, the convening authority had selected three general court-martial panels (P,Q,R) to hear cases within this command. Each panel had 10 members with a colonel as president, a lieutenant colonel as the next ranking officer, either two majors and three captains or three majors and two captains, two lieutenants – of whom at least one was a female – and a warrant officer. Thus, as pointed out in the Government's brief, the panels were similarly composed; and the standard composition was well balanced between senior and junior officers. The reduction in Panel R because of the excusal or unavailability of the president and five other members destroyed this composition, chosen by General Becton; and the method used for replacement substantially restored it. This is persuasive circumstantial evidence, uncontroverted by the defense, that neither the convening authority nor his subordinates impermissibly used rank to exclude otherwise eligible members from this court-martial.

D

On appeal, appellant has expanded his argument that impermissible criteria were utilized by the convening authority in detailing these replacement members. He notes that two female lieutenants who were members of Panel R had been excused and that the staff judge advocate specifically recommended that a female lieutenant on Panel P be appointed as a replacement because a female was a victim of the assault with which Marsh was charged. According to appellate defense counsel, the acceptance of this recommendation by General Becton – presumably for the reason suggested by the staff judge advocate – violated the principle that gender is not a constitutionally permissible basis for inclusion on a panel (*see United States v. Crawford*, 15 U.S.C.M.A. 31, 49, 35 C.M.R. 3, 21 (Ferguson, J., dissenting) (1964)). Moreover, he com-

plains that the sex of a court member is not one of the six permissible considerations authorized in Article 25(d)(2) and that in the present case this selection was made for the purpose of stacking the panel against appellant, who is a male. *See generally United States v. Hedges, supra.*

Although trial counsel expressly acknowledged in the presence of Marsh and his counsel that the staff judge advocate had advised the convening authority to detail the female member because there was a female victim in this case, defense counsel made no objection to her appointment to the panel on this basis. He did not assert that her inclusion on the panel was constitutionally suspect (*cf. Brooks v. Beto*, 366 F.2d 1 (5th Cir.1966), *cert denied*, 386 U.S. 975, 87 S.Ct. 1169, 18 L.Ed.2d 135 (1967)), or that it violated Article 25(d)(2) (*cf. United States v. Smith*, 18 M.J. 704 (A.C.M.R. 1984)). Moreoever, he did not call the staff judge advocate as a witness in order to provide a more complete record concerning the recommendation and its acceptance.

Because two female members had been excused from Panel R, the panel to which the case had originally been referred for trial, the appointment of one female as a replacement can hardly be considered "packing" the court in the sense of *United States v. Hedges, supra.* Moreover, this woman had previously been detailed as a court member on another panel, a fact suggesting that the convening authority had already determined her qualifications as a court member in accordance with Article 25(d)(2). Finally, appellant's counsel neither questioned her on *voir dire* concerning possible sexual bias against appellant or in favor of the victim; nor did he challenge her for cause on this basis; or even exercise his peremptory challenge in this case. Accordingly, this objection to the court-selection process must be considered waived.[4] *United States v. Wilson*, 21 M.J. 193, 197 (C.M.A.1986).

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[4] If appellant was unhappy with the extent to which the convening authority had employed seniority in selecting the replacements, he could have improved the situation by peremptorily challenging one of the more senior members. However, he failed to do so.

E

The individual attacks on the detailing process in the present case are deemed without merit. Viewed together, we conclude that they do no more than suggest than an attempt was made to preserve the nature of the original panel. This is not court-packing, and it does not create an impression which undermines the fairness and integrity of the military-justice system.

II

The second granted issue in this case challenges the military judge's refusal to strike the trial testimony of the victim and a military police investigator. Appellant asserts that the military judge's ruling violated the Jencks Act, 18 U.S.C. § 3500. He argues that the Government was required by this statute to produce upon defense request the tapes of these witnesses' previous testimony at an Article 32 UCMJ, 10 U.S.C. § 832 investigation. 18 U.S.C. §§ 3500(b) and (e). He further contends that this statute required the military judge to strike the witnesses' trial testimony when the Government failed to produce these tapes. 18 U.S.C. § 3500(d).

It is now well-established that the Jencks Act applies to trials by court-martial. *United States v. Jarrie*, 5 M.J. 193 (C.M.A.1978); *United States v. Albo*, 22 U.S.C.M.A. 30, 46 C.M.R. 30 (1972); *see United States v. Augenblick*, 393 U.S. 348, 355-56, 89 S.Ct. 528, 533-34, 21 L.Ed.2d 537 (1969); *United States v. Bryant*, 439 F.2d 642, 651 (D.C.Cir.1971). Moreover, the act itself clearly includes statements recorded by means of tape. 18 U.S.C. § 3500(e)(2). *See Palermo v. United States*, 360 U.S. 343, 351-52, 79 S.Ct. 1217, 1224-25, 3 L.Ed.2d 1287 (1959); *United States v. Merlino*, 595 F.2d 1016 (5th Cir. 1979). However, a question not yet decided by this Court is whether the act covers statements made by government witnesses at an Article 32 investigation in the presence of an accused and his counsel. *Cf. United States v. Munroe*, 421 F.2d 644 (5th Cir.), *cert. denied*, 400 U.S. 851, 91 S.Ct. 79, 27 L.Ed.2d 89 (1970); *United States v. Baker*, 358 F.2d 18 (7th Cir.), *cert. denied*, 385 U.S. 869, 87 S.Ct. 135, 17 L.Ed.2d 96 (1966).

The Courts of Military Review, including the court that reviewed appellant's case, have uniformly held that the Jencks Act applies to tapes of statements made by government witnesses at such a hearing. *See United States v. McDaniel*, 17 M.J. 553 (A.C.M.R.1983); *United States v. Thomas*, 7 M.J. 655 (A.C.M.R.1979), *aff'd on other grounds*, 11 M.J. 135 (C.M.A.1981); *United States v. Patterson*, 10 M.J. 599 (A.F.C.M.R.1980); *United States v. Scott*, 6 M.J. 547 (A.F.C.M.R.1978); *United States v. Combs*, 28 C.M.R. 866 (A.F.B.R. 1959); *United States v. Strand*, 17 M.J. 839 (N.M.C.M.R.1984). This conclusion is justified on the basis of the broad language of the statute in its amended form (*see generally United States v. Calley*, 46 C.M.R. 1131, 1191-93 (A.C.M.R.1973), *aff'd on other grounds*, 22 U.S.C.M.A. 534, 48 C.M.R. 19 (1973)); its express inclusion in section (e)(3) of statements to a grand jury; and its failure expressly to except statements made in the presence of the accused and his counsel. Such a conclusion is especially appropriate in the present case where it was office policy that these tapes be preserved; the reporter indicated to counsel prior to the hearing that he would retain the tapes, and defense counsel reasonably relied on this assurance. *See Jencks v. United States*, 353 U.S. 657, 668, 77 S.Ct. 1007, 1013, 1 L.Ed.2d 1103 (1957).

[9] The final question we must decide is whether the Jencks Act dictates the drastic remedy of striking the testimony of these witnesses because of the Government's failure to produce these materials. 18 U.S.C. § 3500(d). The Supreme Court has indicated on several occasions that good-faith loss of such materials may not require the same sanction required for deliberate suppression or for bad-faith destruction of these materials. *United States v. Augenblick, supra*, 393 U.S. at 355–56, 89 S.Ct. at 533–34; *Killian v. United States*, 368 U.S. 231, 242, 82 S.Ct. 302, 308–309, 7 L.Ed.2d 256 (1961); *Campbell v. United States*, 365 U.S. 85, 98, 81 S.Ct. 421, 428, 5 L.Ed.2d 428 (1961). *See generally United States v. Bryant, supra*. In the present case, no evidence was presented that the Government intentionally withheld these tapes or destroyed them in a bad-faith effort to frustrate the

defense or in accordance with routine, but misguided, office procedure. *Cf. United States v. Jarrie, supra* at 195; *United States v. Carrasco*, 537 F.2d 372 (9th Cir.1976); *United States v. Bryant, supra* at 652 n. 21.

The Government introduced substantial evidence that it lost these tapes despite a good-faith effort on its part to preserve these materials. *See generally United States v. Bryant, supra.* It established that it was office policy for these tapes to be preserved for trial. It also introduced testimony from the court reporter and his supervisor as to the particular steps they took in accordance with this policy. While some negligence may have occurred in the execution of this policy,[5] there was no gross negligence amounting to an election by the prosecution to suppress these materials. *United States v. Jackson*, 450 A.2d 419, 427 (D.C.1982); *Johnson v. United States*, 298 A.2d 516, 520 (D.C.1972). Moreover, appellant was provided a summarized transcript of the witnesses' prior testimony which the court reporter testified without contradiction was "almost word for word."

The defense's cross-examination based on these transcripts was effective; and from our examination of the record we are convinced that the trial defense counsel was not signficantly encumbered in his cross-examination of government witnesses because of the unavailability of the tapes of the testimony given at the Article 32 investigation. Accordingly, we conclude that the military judge did not err in refusing to strike the testimony of these government witnesses. *United States v. Bastanipour*, 697 F.2d 170, 174 (7th Cir. 1982), *cert. denied*, 460 U.S. 1091, 103 S.Ct. 1790, 76 L.Ed.2d 358 (1983); *United States v. Perry*, 471 F.2d 1057, 1068 (D.C.Cir. 1972).

III

The decision of the United States Army Court of Military Review is affirmed.

Judge COX, concurs.

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[5] On one occasion the trial judge stated that the tapes "evidently" were "stolen." Later he ruled the tapes were "lost."

UNITED STATES ARMY COURT OF MILITARY REVIEW

Before
O'DONNELL, FOREMAN and WERNER
Appellate Military Judges

CM 441079

UNITED STATES, APPELLEE,

v.

PRIVATE FIRST CLASS JEFFERSON N. MARSH,
SSN 093-42-3649, UNITED STATES ARMY, APPELLANT.

Headquarters VII Corps
J. W. Hanft, Military Judge

Colonel Wiliam G. Eckhardt, JAGC, Colonel Edward S. Adamkewicz, Jr., JAGC, Lieutenant Colonel R. Rex Brookshire, II, JAGC, Major Raymond C. Ruppert, JAGC, Major Joyce E. Plaut, JAGC, Captain David M. England, JAGC, and Captain Rita R. Carroll, JAGC, were on the pleadings for appellant.

Colonel R. R. Boller, JAGC, Lieutenant Colonel John T. Edwards, JAGC, Captain Kenneth H. Clevenger, JAGC, and Captain James C. Underhill, Jr., JAGC, were on the pleadings for appellee.

4 February 1983

MEMORANDUM OPINION

O'DONNELL, Senior Judge:

The appellant was convicted by a general court-martial of committing an aggravated assault in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928 (1976). He was sentenced to confinement at hard labor for one year, forfeiture of all pay and allowances for one year, and reduction to Private E-1. The convening authority approved the sentence.

The appellant asserts that the members detailed to his court-martial were improperly selected and therefore that his court-martial lacked personal jurisdiction over him. The charges were initially referred to trial by the general court-martial convened by Court-Martial Convening Order Number 367, dated 8 December 1980. According to a stipulation of fact, the trial counsel learned that because several of the members detailed by that order had been excused by the convening authority, additional members needed to be detailed. She was then instructed by the chief of the criminal law division in the office of the staff judge advocate to determine which members from another panel previously selected by the convening authority would be available. She was told to do this by starting with First Lieutenant Mitchell, a female officer, and then by order of seniority down the list to "find the first five members who were available on the scheduled trial date." After the trial counsel did so, the staff judge advocate recommended to the convening authority that the five members be detailed to the appellant's trial. He also advised the convening authority that he was not limited to those named but "could select members from throughout the command." The convening authority agreed and detailed the five persons recommended. This action was appropriately reflected in an amending order.

The appellant contends that the additional court members were not personally selected by the convening authority but rather were "hand-picked" by the prosecution. We disagree. The convening authority had previously selected the two court-martial panels from which the court members in appellant's case were drawn and personally selected the precise composition of the panel which heard the appellant's case. The staff judge advocate in no way usurped the convening authority's personal responsibility in this regard. The assistance he provided to the convening authority was proper. *See United States v. Newcomb*, 5 M.J. 4, 7 n.8 (CMA 1978); *United States v. Firmin*, 8 M.J. 595, 597 (ACMR 1979), *pet. denied*, 9 M.J. 5 (CMA 1980). *Cf. United States v. Ryan*, 5 M.J. 97 (CMA 1978).

The appellant next asserts that the military judge erred by refusing to strike the testimony of the victim and a military police investigator pursuant to the Jencks Act, 18 U.S.C. § 3500. Both of these witnesses testified at the Article 32 investigation. The legal clerk who recorded those proceedings was asked by the appellant's counsel to preserve the tape recordings. The clerk replied that he would. Upon changing jobs, the clerk gave the tapes to Specialist Stange, the noncommissioned officer in charge of the branch legal office involved. That individual testified that he placed the tapes in his desk, but did not take any special steps to protect them, and could not recall if they were specially marked. Shortly before trial, the defense counsel asked to review the tapes. At that time, it was discovered that they had disappeared. As the government could not produce the tapes, the defense, upon completion of the direct examination of both witnesses, moved that the testimony of the witnesses be stricken pursuant to 18 U.S.C. § 3500(d). The military judge denied the motion.

Initially, we find that the tapes were statements within the meaning of Jencks. *See United States v. Thomas*, 7 M.J. 655, 658 (ACMR 1979) *aff'd*, 11 M.J. 135 (CMA 1981); *United States v. Scott*, 6 M.J. 547 (AFCMR 1977). Moreover, the statements were in the possession of the prosecutorial arm of the government as required by the Act. *See United States v. Ali*, 12 M.J. 1018 (ACMR 1982), and cases cited therein. The noncommissioned officer who possessed the tapes was a member of the staff judge advocate's office. The pretrial activities of the staff judge advocate, according to a majority of the Court of Military Appeals, include prosecutorial functions. *See United States v. Lynch*, 13 M.J. 394, 396 (CMA 1982); *United States v. Hardin*, 7 M.J. 399, 403 (CMA 1979). Specialist Stange, as the staff judge advocate's subordinate, entrusted to receive the tapes and protect them against loss and destruction, was an agent of the government within the meaning of the Jencks Act. Accordingly, the Act was applicable in the instant case.

Notwithstanding, we hold that the military judge was correct in denying relief. The legal clerk who recorded the Article 32 investigation prepared a summarized transcript of the

investigation from the tapes. This summary was available to the defense. Our review of the record of trial convinces us that the summary was an accurate and substantially complete rendition of the hearing.

In spite of the fact that the defense specifically requested that the tapes be preserved, we find no prejudice to the appellant by the government's negligent loss of them. *See United States v. Bosier*, 12 M.J. 1010, 1013-15 (ACMR) *pet. denied*, 13 M.J. 480 (CMA 1982). The tapes appear to have been lost due to simple negligence. The summarized transcript was an adequate substitute for the tapes. Both witnesses (the victim and a military police investigator) were subjected to vigorous cross-examination. Moreover, we are convinced beyond a reasonable doubt that the evidence supports the conviction.

During a hearing on sentencing instructions, the trial defense counsel requested that the military judge instruct the members on the punishment of detention of pay. The judge denied the request and stated that he would not have it included on the sentence worksheet. However, he noted that the members would not be precluded from adjudging such a sentence. The defense presented nothing on behalf of the appellant during the sentencing proceedings other than oral argument and did not urge the court to impose detention of pay. When the judge instructed the members, he told them that the sentence worksheet was by no means all-inclusive and that if they wished to consider any other type or kind of punishment not listed on the worksheet, they should seek information from him before deliberating and voting on the sentence. He also cautioned the court not to interpret his instructions as indicating any opinion he had as to the sentence which should be adjudged. We hold it was error for the military judge to fail to give the defense-requested instruction, but we find that no prejudice accrued thereby to the applicant.

The remaining errors asserted by the appellant have been considered and determined adversely to him.

The findings of guilty and the sentence are AFFIRMED.

Judge WERNER concurs in the result only.

FOREMAN, Judge, concurring:

With respect to the Jencks Act issue, I find no evidence of negligence or bad faith on the part of the staff judge advocate. Tape recordings of testimony at an Article 32 investigation fall within the purview of the Jencks Act as the equivalent of a recording of a statement before a grand jury. *See* 18 U.S.C. § 3500(e)(3); *United States v. Thomas*, 7 M.J. 655, 658 (ACMR 1979). Since the tapes were destroyed while in the possession of the United States we must "weigh the degree of negligence or bad faith involved. . . ." *United States v. Bryant*, 439 F.2d 642, 653 (D.C. Cir. 1971). *United States v. Ali*, 12 M.J. 1018, 1020 (ACMR 1982).

The defense, who had the burden of proof as proponent of the motion, presented no evidence of a legal requirement to preserve the tapes. Unlike the Air Force, the Army does not require that such tapes be preserved. *See United States v. Thomas*, 7 M.J. at 658 n.10. There was no local directive requiring that they be preserved. The most the defense could establish was that the clerks in a geographically remote branch office had decided that such tapes should be kept. The only basis on which a duty to preserve the tapes can be founded is the defense request for their preservation. "[I]f verbatim stenographic notes are extant before trial *and the Government has notice of the fact that their production may be required at the time of trial*, there is a duty on the part of those in authority to preserve such notes." *United States v. Combs*, 28 C.M.R. 866, 873 (AFBR 1959) (emphasis added). In this case there is no evidence that the staff judge advocate knew that the tapes existed or that the defense had requested that they be preserved. Common sense dictates that we not impose a duty on a staff judge advocate to preserve evidence pursuant to a defense request unless there is a corresponding duty imposed on defense counsel to communicate such a request to a responsible person who has the authority to act on it. An informal request to a low-ranking clerk is in-

sufficient to trigger such a requirement. Since I find no negligence or bad faith on the part of the staff judge advocate, I join in affirming the findings and sentence.

FOR THE COURT:

/s/ Richard A. Miller

RICHARD A. MILLER
Captain, JAGC
Acting Clerk of Court

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